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# Admiralty -- The Ocean of the Air Revisited

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## NOTES AND COMMENTS

### Admiralty—The Ocean of the Air Revisited

In the embryonic stage of air travel there was uncertainty as to what body of law should control its development. The theory arose that the air surrounding the earth was an ocean in itself and therefore properly the subject of maritime jurisdiction.<sup>1</sup> This theory was never generally accepted, and as early as 1921 Judge Cardozo, analyzing the characteristics of a hydroaeroplane,<sup>2</sup> determined that although it qualified as maritime while afloat "a hydroaeroplane, while in the air, is not subject to the admiralty . . . because it is not then in navigable waters, and navigability is the test of admiralty jurisdiction."<sup>3</sup> Other courts followed suit by holding that an "amphibian plane"<sup>4</sup> and "overseas transport flying boat"<sup>5</sup> were not "vessels"<sup>6</sup> within the purview of admiralty jurisdiction. As a result of such consensus of opinion, the commerce clause of the Constitution, not maritime law,<sup>7</sup> became the basis for federal legislation involving air travel.<sup>8</sup>

This theory was revised in the recent case of *Notarian v. Trans World Airlines*.<sup>9</sup> The plaintiff, Mrs. Notarian,<sup>10</sup> was a passenger on a direct transoceanic flight from Rome, Italy, to Pittsburgh, Pennsylvania. She was returning to her seat from the rest-room when the airplane was "jolted violently,"<sup>11</sup> and personal injury re-

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<sup>1</sup> *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 91-92 n.23 (N.D. Cal. 1954).

<sup>2</sup> *Reinhardt v. Newport Flying Serv. Corp.*, 232 N.Y. 115, 133 N.E. 371 (1921).

<sup>3</sup> *Id.* at 118, 133 N.E. at 372.

<sup>4</sup> *Dollins v. Pan-Am. Grace Airways, Inc.*, 27 F. Supp. 487 (S.D.N.Y. 1939).

<sup>5</sup> *Noakes v. Imperial Airways, Ltd.*, 1939 Am. Mar. Cas. 1048 (S.D.N.Y. 1939).

<sup>6</sup> "Transactions are maritime only when connected with a 'vessel.'" ROBINSON, ADMIRALTY § 8 (1939).

<sup>7</sup> Admiralty jurisdiction was opposed on the rationale that "aerial navigation is more akin to transportation on the earth's surface than it is to sea travel . . ." Bogert, *Problems in Aviation Law*, 6 CORNELL L.Q. 271, 304 (1921).

<sup>8</sup> The Air Commerce Act, 44 Stat. 568-76 (1926), as amended, 49 U.S.C. § 176 (1964).

<sup>9</sup> 244 F. Supp. 874 (W.D. Pa. 1965).

<sup>10</sup> Her husband was also a plaintiff.

<sup>11</sup> 244 F. Supp. at 875.

sulted. The aircraft was unaffected by the disturbance and continued to its destination. The suit for failure to provide a "reasonably safe passage"<sup>12</sup> was brought in admiralty, although there was no physical contact between the airplane and the ocean.

The defendant acknowledged numerous maritime cases involving aircraft<sup>13</sup> but contended that contact with the water is essential for admiralty jurisdiction. The court referred to the "ocean of the air theory" and the fact that the Death on the High Seas Act,<sup>14</sup> a maritime law, has been applied to air travel where no contact with the water was present.<sup>15</sup> Relying on *D'Aleman v. Pan Am. World Airlines*<sup>16</sup> it said:

[I]t has been held that the Death on the High Seas Act grants a right of action in admiralty for death caused by wrongful act, neglect or default occurring in the air space over the high seas . . . . [W]hether a plane comes in actual physical contact with the sea does not matter. What does matter is that the cause of action occurs over the sea.<sup>17</sup>

Holding that admiralty jurisdiction was properly invoked, the court declared that the question of necessity for contact with the water has never been settled and admiralty has a long history of altering its boundaries when necessity and progress demand.

Assuming that the expansion of admiralty jurisdiction authorized in *Notarian* would be generally received, what are the consequences to personal injury claimants such as Mrs. Notarian?

At present suits of this nature are usually governed by the Warsaw Convention.<sup>18</sup> A significant element of this international agree-

<sup>12</sup> *Ibid.*

<sup>13</sup> *E.g.*, *Trihey v. Transocean Air Lines*, 255 F.2d 824 (9th Cir. 1958) (plaintiff's decedent died in a crash in the Pacific Ocean); *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957) (death resulting from a crash off the New Jersey coast). The defendant in *Notarian* contended that the case came within the purview of the Warsaw Convention, but the court held that this was insufficiently pleaded and not to be considered. For the significance of this determination see notes 18-21 *infra* and the accompanying text.

<sup>14</sup> 41 Stat. 537-38 (1920), 46 U.S.C. §§ 761-68 (1964). The act provides for suit in the district courts, in admiralty, when death occurs "on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States." 41 Stat. 537 (1920), 46 U.S.C. § 761 (1964).

<sup>15</sup> *Choy v. Pan-Am. Airways Co.*, 1941 Am. Mar. Cas. 483 (S.D.N.Y. 1941).

<sup>16</sup> 259 F.2d 493 (2d Cir. 1958).

<sup>17</sup> 244 F. Supp. at 877.

<sup>18</sup> Warsaw Convention, July 31, 1934, 49 Stat. 3000, T.S. No. 876. See

ment is the limitation on the amount of recovery in personal injury claims to 125,000 French francs.<sup>19</sup> This is the equivalent of 8,300 dollars.<sup>20</sup> In jurisdictions where tort recoveries are often generous, an injured plaintiff may find that the limitation makes his compensation considerably less than it would be if the same injury had been sustained in another mode of transportation. In fact, the severity of this limitation has resulted in the proposed rejection of the convention by the United States as of May, 1966, if the maximum recoverable amount is not raised.<sup>21</sup>

An aspect of admiralty law that is clearly not appropriate in cases of personal injury or death to airplane passengers while flying over the high seas is the right of a shipowner to the benefits of the Limitation of Liability Act.<sup>22</sup> Under that act the liability of the owner of a vessel for any loss that was occasioned without his privity or knowledge<sup>23</sup> is limited to the value of his interest in the vessel and pending freight with the further proviso that in cases of personal injury or death the limitation fund shall in no event be less than sixty dollars per ton of the vessel's gross tonnage. Tonnage for admiralty purposes refers to the internal space of a vessel, not its weight. An admiralty ton is one hundred cubic feet of space.<sup>24</sup>

Considering the relatively small internal capacity of a passenger aircraft, the inequity of applying the above criteria for limitation of liability to air travel is obvious.<sup>25</sup> It can be argued that the possibility of such application was never contemplated by Congress and

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U.S. CIVIL AERONAUTICS BD., AERONAUTICAL STATUTES AND RELATED MATERIAL 290-331 (rev. ed. 1959). The convention is an international agreement regulating air travel between the participating nations. The original convention was held October 12, 1929.

<sup>19</sup> Warsaw Convention, art. 22(1).

<sup>20</sup> Koninklijke Luchtvaart Maatschappij N.V. KLM v. Tuller, 292 F.2d 775 (D.C. Cir.), cert. denied, 368 U.S. 921 (1961).

<sup>21</sup> Time, Oct. 29, 1965, p. 98. The United States proposal for elevating the limitation is for an immediate raise to \$75,000 with an ultimate ceiling of \$100,000.

<sup>22</sup> 9 Stat. 635 (1851), as amended, 46 U.S.C. §§ 181-89 (1964).

<sup>23</sup> There is much litigation involving the interpretation to be placed on the words "privity or knowledge." See *Coryell v. Phipps*, 317 U.S. 406, 410 (1943); and 3 *BENEDICT, ADMIRALTY* §§ 489-90 (6th ed. 1940).

<sup>24</sup> *Inman S.S. Co. v. Tinker*, 94 U.S. 238, 243 (1876).

<sup>25</sup> The *manner* of ascertainment of the internal capacity in tons is equally foreign to aircraft. It is couched in such nautical terms as "the inside of the plank on the stern timbers . . . the rake of the bow in the thickness of the deck . . . the rake of the stern timber in one-third of the round of the beam . . ." *REV. STAT. §§ 41-53* (1875), 46 U.S.C. § 77 (1964).

therefore the attempt should not be made. If this assumption is valid, it can be further contended that the present dissatisfaction with the personal injury limitation of the Warsaw Convention is evidence that nothing short of the 100,000-dollar permanent limitation, proposed by the United States as an amendment to the Convention, should be placed on recovery. It is submitted that the original purpose of the limitation in admiralty—to encourage the expansion of commerce and trade—is no longer a practical consideration in personal injury suits. Commerce and trade have long since reached an economic level that no amount of personal injury recovery is likely to discourage.

Given the difficulty of fitting the airplane into this phase of maritime law, there are aspects of admiralty that could be applied with ease and benefit to the plaintiff.<sup>26</sup> For example, the relevance of contributory<sup>27</sup> and comparative negligence<sup>28</sup> doctrines could be a significant tactical consideration for the personal injury claimant suing in admiralty. Under the Warsaw Convention, contributory negligence may be a complete bar to recovery.<sup>29</sup> In admiralty, the doctrine of comparative negligence prevails.<sup>30</sup> The fault of the plaintiff may be used to mitigate damages but not to defeat the claim entirely.

The prerequisites to federal jurisdiction could be a monumental reason for bringing suit in admiralty. A trial in federal court, absent a federal question,<sup>31</sup> requires that the claimant show diversity of citizenship and meet the 10,000-dollar amount-in-controversy

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<sup>26</sup> 18 U.S.C. § 7 (1964) has already brought aircraft into maritime jurisdiction for criminal purposes. It deals with crimes committed over the high seas and provides:

The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes: . . . .

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

<sup>27</sup> For a discussion of contributory negligence see PROSSER, *TORTS* § 64, at 426-37 (3d ed. 1964).

<sup>28</sup> For a discussion of comparative negligence see *id.* § 66, at 443-49.

<sup>29</sup> Warsaw Convention, art. 21.

<sup>30</sup> *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953).

<sup>31</sup> 28 U.S.C. § 1331(a) (1964) provides that "the district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

requirement.<sup>32</sup> In an admiralty suit, the federal court has jurisdiction in "any civil case of admiralty and maritime jurisdiction"<sup>33</sup> regardless of diversity or amount in controversy.

A possible disadvantage to exclusive admiralty jurisdiction is that the case will be tried by judge without jury.<sup>34</sup> But if the claimant desires a jury trial and is able to meet the requirements previously mentioned for suit in a federal court, the language of the "saving clause"<sup>35</sup> may afford the opportunity. This exception to maritime jurisdiction preserves a common-law cause of action, where one exists, to the plaintiff with an in personam<sup>36</sup> claim. It allows the suit to be brought on the law side of the federal court (a state court proceeding is also available) with a jury trial even though the case arises in a maritime context. If this choice is made the plaintiff must be prepared to meet the diversity and amount-in-controversy requirements. It was urged by the plaintiff in *Romero v. International Terminal Operating Co.*<sup>37</sup> that a suit founded in admiralty, if the claimant chooses the law side of the federal court by way of the "saving clause," does not require diversity of citizenship as the claim arises under the Constitution and laws of the United States. Plaintiff, an alien seaman, had a basis for his contention because admiralty jurisdiction is authorized by the Constitution<sup>38</sup> and codified.<sup>39</sup> But in a five-to-four decision the Court rejected this interpretation. The dissent, led by Justice Brennan,

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<sup>32</sup> 28 U.S.C. § 1332(a) (1964).

<sup>33</sup> 28 U.S.C. § 1333 (1964).

<sup>34</sup> ROBINSON, *op. cit. supra* note 6, § 1, at 2. It is interesting to note that not all attorneys consider a jury trial advantageous in litigation involving aircraft. At the Twenty-first Annual Law Institute of the University of Tennessee College of Law and the Knoxville Bar Association, Mr. Lee S. Kreindler, member of the New York Bar, expressed a definite preference for judge trials. Referring to recent cases in which he was counsel for the plaintiffs in suits against air lines, he said that it was the defendant air lines that requested a jury. This was explained in part by the inability of many jurors to identify with air line passengers as many have yet to fly and still think that one who "is fool enough to set foot on an airplane is assuming a very, very serious risk." *Trial Tactics in Aviation Litigation*, 28 TENN. L. REV. 173, 181-82 (1961).

<sup>35</sup> 28 U.S.C. § 1333 (1964). It is so designated because it preserves a common-law cause of action for the plaintiff who qualifies and operates as an escape valve from the exclusive maritime jurisdiction.

<sup>36</sup> A claim against the owner of the vessel as opposed to an in rem proceeding against the vessel itself. A suit to attach a lien on the vessel would be an example of the latter.

<sup>37</sup> 358 U.S. 354 (1959). For a full discussion of the case see BAER, ADMIRALTY LAW OF THE SUPREME COURT § 1-13, at 62-69 (1963).

<sup>38</sup> U.S. CONST. art III, § 2.

<sup>39</sup> 28 U.S.C. § 1873 (1964).

agreed with the plaintiff that no diversity should be required. It has been suggested that an acceptance of the minority position would be desirous "because there is little logic in a system of law which affords a seaman suing on a maritime cause of action a federal jury trial if there happens to be diversity of citizenship but which denies him a jury in the same federal court if there is no diversity."<sup>40</sup> If this rationale were adopted, it would apply to passenger claimants as well as seamen and be an additional inducement to seeking maritime jurisdiction.<sup>41</sup>

The advantages, disadvantages, and problems evidenced in the previous discussion must be considered in the light of possible departure of the Warsaw Convention from the transoceanic flight scene in the United States.<sup>42</sup> If these rules disappear, admiralty is a logical replacement.

Some aspects of admiralty, like the tonnage provision,<sup>43</sup> would be difficult to employ. It is submitted that a selective process would be in order, a new set of rules governing transoceanic air travel using the basic concepts of admiralty as a foundation with liberal provision for adjustment to the rapid developments that characterize modern aviation.

WILLIAM H. FAULK, JR.

#### Constitutional Law—Cruel and Unusual Punishment— Chronic Alcoholism

In *Driver v. Hinnant*<sup>1</sup> defendant had been found guilty and sentenced<sup>2</sup> to imprisonment for two years for violation of a North Carolina statute making it a misdemeanor for "any person . . . [to] be found drunk or intoxicated on the public highway, or at any public place or meeting . . ."<sup>3</sup> Defendant had been convicted of

<sup>40</sup> BAER, *op. cit. supra* note 37, at 69.

<sup>41</sup> The problem does not arise if the state forum is chosen. But if contributory negligence is an issue, it may nullify any prospective advantage of jury trial. In *Notarian*, contributory negligence was not an issue but this writer is informed that a three- or four-year backlog in the Pennsylvania courts played a significant role in the decision to sue in admiralty. Letter from plaintiff's attorney to the writer, Jan. 31, 1966.

<sup>42</sup> See text accompanying note 21 *supra*.

<sup>43</sup> See text accompanying note 22 *supra*.

<sup>1</sup> *Driver v. Hinnant*, 34 U.S.L. Week 2422 (4th Cir. Jan. 22, 1966).

<sup>2</sup> *Driver v. Hinnant*, 243 F. Supp. 95, 96 (E.D.N.C. 1965).

<sup>3</sup> N.C. GEN. STAT. § 14-335 (1953).